93-617

Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

WILLIE J. DUNN, ET AL.

PETITIONER

VERSUS

WILMA D. SIMS,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE

SUPREME COURT OF ALABANA

CASE NO. 1911395

PETITION FOR WRIT OF CERTIORARI

Willie J. Dunn
PRO SE
4028 Juanita Circle
Roosevelt City, AL 35020
205/424-1776

QUESTIONS PRESENTED

1. Whether the Supreme Court of Alabama erred in enforcing the settlement agreement on an issue which was not properly preserved for review and one only raised by amicus curiae?

2. Whether the Due Process and Equal Protection Clause of the Fourteenth Amendment vindicate the denial, violation or abridgement of procedural due process rights- the right to a fair trial, a fair tribunal, notice and the right to be heard?

3. Whether there is a conflict in the courts of Alabama regarding the enforcement of settlement agreements pursuant to Section 34-3-21, Code of Alabama(1975) and Rule 47, Alabama Rules of Appellate Procedure in juxtaposition with Rule 1, Alabama Rules of Appellate Procedure and the due process clause of the Fourteenth Amendment to the U.S. Constitution?

LISTING OF ALL PARTIES

The following constitues a listing of all parties to this case:

Susan B. Dunn, wife of petitioner

The estate of Liela P. Dunn, deceased mother of petitioner

Wilma D. Sims, defendant/respondent

Attorney Charles P. Gaines, attorney of record representing respondent

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REFERENCE TO OFFICIAL OPINIONS

R-336 Petition for writ of mandamus overruled

R-347 Petition for rehearing overruled

R-450 Judgment, enforcing settlement agree-

ment.

CAS-p.008 Post-trial order denying new trial

Mar. 31, 1992 Order, Supreme Court of Alabama placing case in the Alabama Court of Civil Appeals

Apr. 24, 1992 Opinion of the Alabama Court of Civil Appeals reversing and remanding this case to the trial court

May 22, 1992 Alabama Court of Civil Appeals modifies opinion, denies application for rehearing

Aug. 21, 1992 Writ of certiorari granted by the Supreme Court of Alabama

Sept. 8, 1992 Order, granted until September 11, 1992 to file appellant's brief

Oct. 1, 1992 Case submitted on brief

May 28, 1993 Supreme Court of Alabama renders its opinion reversing the Alabama Court of Civil Appeals

July 23, 1993 Appellant's application for rehearing overruled

Aug. 27, 1993 Case remanded to the Alabama Court

Sept. 8, 1992 Certificate of Judgment served upon petitioner

STATEMENT OF JURISDICTION

This Court's jurisdiction found under 28 U. S.C.A. §1254(1) and the fact that petitioner invoked the protection of the Fourteenth Amendment to the U.S. Constitution as early as May 11, 1991 while this case was in the trial court (R-297-298).

(i) Judgment entered May 28, 1993

(ii) Rehearing overruled July 23, 1993

(iv) 28 U.S.C.A., §1254(1)

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

First Amendment:

Congress ahall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the govern-

ment for redress of grievances.

Fourth Amendment:

The right of people to be secure in their person, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Seventh Amendment:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

Fourteenth Amendment:

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge

the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Alabama(1901)

Article I, §6:

That in all criminal prosecutions, the accused has a right to be heard by himself and counsel, or either; to demand the nature and cause of the accusation; and to have a copy thereof; to be confronted by witnesses against him; to have compulsory process for obtaining witnesses in his favor; to testify in all cases, in his own behalf, if he elects so to do; and in all prosecutions by indictment, a speedy, public trial, by an impartial jury of the county or district in which the offense was committed; and he shall not be compelled to give evidence against himself, nor be deprived of life, liberty, or property, except by due process of law; but the legislature may , by a general law, provide for a change of venue at

the instance of the defendant in all prosecutions by indictment, and such change of venue, on application of the defendant, may be heard and determined without the personal presence of the defendant so applying therefor; provided, that at the time application for change of venue, the defendant is imprisoned in jail or some legal place confinement.

Article I, § 11 Right to trial by jury.

Article I, § 13 Courts to be open; remedies for all injuries; impartiality of justice

That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.

Amendment No. 328

6.02. The supreme court.

(a) the supreme court shall be the highest court of the state and shall consist of one chief justice and such number of associate justices as may be prescribed by law.

(b) The supreme court shall have original jurisdiction (1) of cases and controversies as provided by this Constitution, (2) to issue such remedial writs or orders as may be necessary to give general supervision and control of courts of inferior jurisdiction, and (3) to answer questions of state law certified by a court of the United States.

(c) The supreme court shall have such appellate jurisdiction as may be provided by law.

Statutes:

Section 12-3-16, Code of Alabama(1975)

The decisions of the supreme court shall govern the holdings and decision of the courts of appeals, and the decisions and proceedings of such courts of appeals shall be subject to the general supertendence and control of the supreme court as provided by constitutional amendment No. 328.

Section 34-3-21, Code of Alabama(1975)

An attorney has authority to bind his client

in any action or proceeding, by any agreement in relation to such case, made in writing, or by an entry to be made on the minutes of the court.

28 U.S.C.A., §1254(1)

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certioriar granted upon petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

Alabama Rules of Appellate Procedure (A.R.A.P.)

Rule 1. Scope of Rules

These rules govern appeals to the Supreme Court, the Court of Civil Appeals, and the Court of Criminal Appeals, and proceedings on petition for writs or other relief which these courts or judges thereof are enpowered to grant. All cases appealable to the Court of Criminal Appeals shall be governed by those rules contained herein which are applicable to appeals to that court; and, pretrial appeals by the state in criminal cases shall be governed also by the rule of criminal procedure

providing for such appeals. These rules shall not be construed to extend or limit the jurisdiction of these appellate courts as established by constitution or law. They shall be construed so as to assure the just, speedy, and inexpensive determination of every appeallate proceeding on its merits. (Amended effective April 1, 1984.)

Rule 39(k) Review of Decisions of Courts of Appeals

(k) Scope of Review. The review shall be that generally employed by certiorari and will ordinarily be limited to the facts stated in the opinion of the particular court of appeals. If the petitioner is not satisfied with that statement of facts, he may, on application for rehearing in that court, present any additional or corrected statement of facts and request that court to add or correct those facts in its opinion on rehearing. If the court fails to accede to this request, petitioner may copy the statement in the petition to this court, with references therein to pertinent portions of the clerk's record and reporter's transcript, and it will be considered

along with the statement of facts in the opinion of the appellate court, if found to be correct.

The application of the law to the stated facts is included in the scope of review.

In all cases in which the death penalty has been imposed, upon review of the opinion of the Court of Criminal Appeals on certiorari, the Supreme Court may notice any plain error or defect in the proceeding under review, whether or not brough to the attention of the trial court, and take appropriate action by reason thereof, whenever such error has or probably has adversely affected the substanial rights of the petitioner.

Rule 47. Agreement in Writing

No private agreement or consent between the parties or their attorneys relating to the proceedings in any cause, shall be alleged or suggested by either against the other, unless the same be in writing, and signed by the party to be bound thereby; provided, however, agreements made in open court or at pretrial conference are binding whether such agreements are oral or written.

Alabama Rules of Civil Procedure(A.R.C.P.)

Rule 1.Scope of Rules

(a) Scope. These rules govern procedure in the circuit courts and in courts of full, like jurisdiction, in the district courts as provided in sub-paragraph "(dc)' of each rule, in the small claims courts as provided in Rule N of the Small Claims Court Rules, and in all other courts where appeals lie directly to the Supreme Court or Court of Civil Appeals, in all suits of a civil nature, including those in which the State of Alabama or a political subdivision thereof is a party, whether cognizable as cases at law or in equity, except probate courts not exercising statutory equitable jurisdiction, and proceedings enumerated in Rule 81, and other exceptions stated in Rule 81.

(b) These rules effect an integrated procedural system vital to the efficient functioning of the courts.

(c) These rules shall be construed to secure the just, speedy and inexpensive determination of

every action.

Rule 5. Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal and similar paper shall be served upon each of the parties. No service need br made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim or appearance shall be

made upon the person having custody or possession of the property at the time of the seizure.

Rule 12. Defenses and objections-When and how presented-By pleading or motion-Motion for judgment on the pleadings.

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granded, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a

claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(g) Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provid-

ed in subdivision (h)(2) hereof on any of the grounds there stated.

Rule 78. Motion Day. Each circuit shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provisions by rule or order for submission and determination of motions not seeking final judgment without oral hearing upon written statements of reasons in support and opposition.

Alabama Canons of Judicial Ethics(1975)

Canon 3(C)(1)(a)

Canon 3. A judge should perform the duties of his office impartially and diligently.

The judicial activities of a judge take precedence over his other activities. His judicial duties include all the duties of his office pre-

scribed by law. In the performance of these duties, the following standards apply:

C. Disqualification:

(1) A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned, including but not limited to instances where:

(a) He has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceedings.

STATEMENT OF THE CASE

Facts Material To The Questions Presented

On May 17, 1991, petitioner made application to the Supreme Court of Alabama for a writ of mandamus directed to the Honorable Jerry Fielding, Circuit Court, Talladega County, Alabama, for a stay of an order entered on the same day defendant motioned for it, without giving petitioner an opportunity to oppose it. It also sought an order removing the trial judge from

this case on the ground that he had shown a personal predisposition of bias and prejudice toward petitioner. It was further shown that the trial court had denied petitioner due process rights, invoking the protection of the First, Fourth (Fourteenth) and Seventh Amendments to the U.S. Constitution. The manner in which the federal questions were raised was as follows:

> "Petitioner filed an objection on the grounds that the complete personnel and employment files of he contained privileged and confidential information; that to provide such information to defendant constituted an abridgement of a substantive right protected by the First, Fourth (Fourteenth) and Seventh Amendments to the Constitution." (p.7)
>
> "The right to substantive due process, a fair trial, and a fair tribunal are fundamental to our judicial process. These rights should not be abridged because of a trial judge's personal bias and preju-

dice toward a litigant. In this case the petitioner." (p.8)

"The First Amendment protects freedom of speech. While written "letters, notes, memos, and other matter" may not be considered as speech, petitioner advances the theory that speech encompasses the thought processes which produced the letter, memo, or any other written matter. Therefore, to make petitioner's letters, memos, and any other written matters available to a none interested party constitutes an abridgement of a substantive right." (p.8)

"The writ should be issued because the Fourth (Fourteenth) Amendment guarantees petitioner privacy rights; protection from unreasonable searches (Petitioner advances the position that the production of his writings constitutes unreasonable searches of his written matter.); and the due process." (p.8)

"2. Whether a stay of the Court's Order Entered May 8, 1991, would protect the funda-

> mental principles of fairness (right to a fair trial, to a fair tribunal) and substantive due process guarantees." (p.11)
>
> (See Petition For Writ Of Mandamus, filed May 17, 1991, R-300)

On May 31, 1991, the Supreme Court of Alabama overruled the petition. At this point, the case had gone forward for eleven months at the trial court level.

On May 16, 1991, petitioner filed objection to the trial court entering an order on the same day defendant motioned for it without giving petitioner an opportunity to be heard in opposition thereto, invoking the protection of the Fourteenth Amendment, to wit:

> "That the production of the information sought would infringe upon constitutional rights guaranteed under the First, Fourth, (Fourteenth) and Fifth Amendment." (R-338)

The trial court did not dispose of this objection nor did it act on these constitutional rights. At this juncture, the case had been be-

fore the trial court for eleven months.

On May 28, 1991, petitioner filed objection to the defendant's motion to enforce the settlement agreement on the ground that for the trial court to do so would deny he the right to a trial by jury under the Seventh Amendment. The manner in which the federal question was raised was as follows:

> "Objects on the ground that to enforce the agreement would deny plaintiff the 7th Amendment guarantee, i.e., the right to a jury trial." (R-344)

The trial court did not act on this constitutional guarantee. The case had now gone forward for twelve months.

On June 14, 1991, petitioner made application to the Alabama Supreme Court for a rehearing de novo regarding his writ of mandamus, arguing that if the trial court's order of May 8, 1991 were allowed to stand, it would abridge substantive rights protected by the First and Fourth Amendments, to wit:

> "Appellant filed objection on May 11, 1991, arguing that appellant's personnel files contained confidential privileged information and that for said information to be disclosed to a non-interested party constituted an abridgement of substantive rights protected by the First and Fourth Amendments to the Constitution." (R-361)

The Supreme Court of Alabama did not act on these constitutional rights. At this stage of the proceedings, the case had gone forward for twelve months.

On July 23, 1991, petitioner amended his objection on the ground that he was prejudiced by the defendant failure to give notice that oral testimony would be adduced from his former attornity; that he was totally and completely surprised at the trial; and because he was not given notice of a full trial, he was not prepared. That the attorney for the defendant had been served with a copy of the settlement agreement attached to plaintiff's Motion To Place Into Issue Defen-

dant's Bad Faith (R-437) filed February 15, 1991. And on the ground that petitioner needed a witness to give testimony in opposition to the defendant's claims; that he was prejudiced by Attorney Ralph D. Gaines, III (sic) trying the case and that the trial court relied upon a copy of the settlement agreement rather than the original as required under the rule of evidence, citing Federal Rule of Evidence, Rule 901(a).

On August 13, 1991, the trial court entered an order enforcing the settlement agreement. It did not act on the petitioner's constitutional questions raised through his objections. At this stage of the proceedings, the case had gone forward for one year and two months since the settlement agreement was signed and rejected.

On September 6, and again on September 11, 1991, petitioner filed motions for a new trial arguing that under provisions of Rule 5, A.R.C.P. petitioner should have been given notice that a full trial was to be conducted and that his former attorney would be subpoenaed to testify against

he. And that the Honorable William Sullivan's testimony was needed to controvert claims of the defendant. On October 13, 1991, the trial court heard petitioner's motion. The Honorable William Sullivan testified that he did not recall petitioner having come to him and rejected the settlement agreement; nor did he recall that he would continue the case to jury trial. The record show that Judge Sullivan did not enter an order dismissing the case (Court Reporter's Transcript, CRT- R-66) And that if a settlement agreement had been reached, it would have terminated the case. (CRT-R-65)

Petitioner testified that since there was no record of the settlement agreement, it was unenforceable under Bowman vs. Integrity Credit Corp., 507 So.2d 104.

Defendant also testified that a copy of the settlement ageement was served upon he attached to the Motion To Place Into Issue Defendant's Bad Faith. (CRT-R-37)

The trial court overruled petitioner's mot-

ion for a new trial, entering it on the case action summary sheet.

On December 9, 1991, petitioner served notice of appeal to the Supreme Court of Alabama. Susan B. Dunn, party plaintiff and wife of petitioner did not join in the appeal. On March 16, 1992, petitioner filed his brief, arguing that the trial court erred in enforcing the settlement agreement as Section 34-3-21, Code of Alabama(1975) did not invest in his former attorney authority to bind he to a settlement that was unfair, unjust and one which did not cover his out-of pocket expenses nor pay he for pain and suffering. That since the defendant filed several Rule 12(b) motions, that he was required to file an affirmative defense estopple this case from going forward under Rule 12(g) A.R.C.P. That because he did not object or file an affirmative defense estopple this case from going forward, he waived any right to enforcement. Petitioner further argued that he did not get a fair trial and that the judge was prejudice toward he by allowing three

different attorneys to come before the court and represent the defendant; that he had entered an order the same day it was motioned for; that he had refused to hear seven of petitioner's motions; and he had told the petitioner to get himself a lawyer in open court, causing great laughter among the white attorneys. The manner in which the petitioner raised the federal question was as follows:

> "These rights were so important that to deny them constituted abridgement of substantive rights under the Seventh Amendment to the U.S. Constitution." (p.50)
>
> "This case should be remanded on the ground that Dunn's legal rights were abrused which in the main abridged Dunn's substantive due process under...the Seventh Amendment to the U.S. Constitution." (p. 53)
>
> (See Brief For The Appellant, filed March 16, 1992)

On March 31, 1992, this case was ordered moved to the Alabama Court of Civil Appeals.

On March 30, 1992, defendant/respondent filed her brief, averring that while petitioner's statement of the facts was extensive, she did not disagree with most of them. Defendant/respondent did not correct any of the facts relative to this case, arguing that Rule 47, A.R.A.P. was dispositive of the issues regarding the enforcement of a settlement agreement. Petitioner, in his reply brief denied that this was the issue, averring that his legal rights, due process-procedural, statutorial and constitutional-rights were at issue, invoking the protection of the Fourteenth Amendment, to wit:

> "Avers that when an attorney at law willfully and intentionally withhold physical evidence for the purpose of keeping the judgment low violated Dunn's Fourteenth Amendment rights." (p. 14)

(See Reply Brief, filed April 13, 1992)

On April 24, 1992, the Alabama Court of Civil Appeals entered its opinion, revering and remanding this case to the trial court with instr-

uctions. Holding that the trial court erred in enforcing the settlement as it did not satisfy the law under Rule 47, A.R.A.P.: (1) the agreement was not reduced to a court order, dismissing the case; (2) there were no indices of it being announced in open court; and (3) the minutes of the court contained no record of it. It further found that the agreement was not signed by the parties to be bound thereby, i.e., Susan B. Dunn and a representative of the estate of Leila P. Dunn. The opinion also found that the case action summary sheet contained an entry of "proposed settlement agreement." It therefore found that the settlement agreement was only proposed. The opinion did not address petitioner's question of a right to a jury trial.

On May 7, 1992, respondent made application for rehearing arguing that the opinion ignored prior holding enforcing settlement agreements in accordance with provisions under Rule 47, A.R.A.P. It then requested that the court make several corrections, pursuing to Rule 39(k), A.R.A.P.

Among the facts respondent requested to be corrected were: there was no entry of the settlement agreement on the record; that a clerk in the trial court's office had mistakenly entered on the record "proposed settlement agreement." That it was not attempting to enforce an agreement made in open court, but rather one signed by the party who was to be bound thereby; and included was a certified copy of the case action summary sheet showing that no such entry was made. The Clerk of the Court provided the certified copies.

On May 22, 1992, the Alabama Court of Civil Appeals modified its opinion and overruled the application for rehearing.

On June 5, 1992, respondent made application to the Supreme Court of Alabama for a writ of certiorari, directed to the Alabama Court of Civil Appeals. It argued that a material question of first impression had arisen in the appellate court and that it had been incorrectly decided. The issue was whether the appeals court erred in holding that Rule 47, A.R.A.P. required a settlement

agreement to be signed by both parties or whether it was enforceable and binding on the party who signed it, pursuing to Rule 47, A.R.A.P. and Section 34-3-21, Code of Alabama(1975).

On June 17, 1992, petitioner filed a reply brief in opposition thereto, arguing that the opinion mirrowed opinions of the Supreme Court regarding the enforcement of settlement agreements. Further arguing that since the respondent had chosen the law under Rule 47, A.R.A.P., she was bound by it, to wit: the law required settlement agreement to be made in open court; that it required it to be entered on the record, and that the parties to be bound thereby did not sign it, i.e., Susan B. Dunn and a representative of the estate of Leila P. Dunn. That therefore, the appeals court had correctly decided the case.

On August 21, 1992, the Supreme Court of Alabama granted the writ, per curian. On September 11, 1992, petitioner filed his brief. He had been granted an extension of time in which to do so. He argued that the appeals court's opinion should

affirmed, based on the applicable law of this case, citing Bowman v. Integrity Corp., supra Anonymous v. Anonymous, 353 So.2d. 515, 518 (Ala 1977); and Jones v. Gladney, 339 So.2d 1019 (Ala. 1976). Petitioner further argued that the respondent never filed an objection to the case going forward nor did he file an affirmative defense estopple it either. That because she failed to assert her rights to enforce the agreement, she acquiesence. Finally, petitioner argued that it was not the legislative intent of Section 34-3-21, Code of Alabama(1975) to invest in his former attorney authority to bind he to a settlement agreement which did not cover his out-of-pocket expenses or pay he for his pain and suffering.

By order of the court, the case was submitted on brief.

On November 13, 1992, Pioneer Financial Service, Inc. motioned for leave to file a brief on the side of respondent, as amicus curiae. It argued that it had an interest in the outcome

of this case, showing that there was a conflict in the Alabama courts regarding the enforcement of settlement agreements between the common law under Section 34-3-21, Code of Alabama(1975) and the requirements under Rule 47, A.R.A.P. That Rule 1, A.R.A.P. placed a limitation on the applicability of Rule 47, A.R.A.P. and that therefore, the Alabama Court of Civil Appeals erred in applying Rule 47, A.R.A.P. to the particular facts of this case.

On November 17, 1992, leave was granted.

On November 20, 1992, petitioner motioned the court for leave to file a motion in opposition thereto. The court did not act on petitioner's motion. The motion argued that amicus curiae was not a party to this case and it therefore could not have an interest in it; that the time for filing such a brief had expired; and that the petitioner had not been given notice that the court was actively soliciting briefs. Arguing further that amicus curiae had raised an issue of whieh the respondent had not raised at the

trial court level nor on appeal. That the Supreme Court of Alabama would not consider any matter/issue that was not raised at the court below or passed on by the court of appeals. The court never acted on petitioner's motion.

On November 27, 1992, petitioner filed his reply brief to amicus curiae's brief, arguing that because respondent had failed to raise an issue of Rule 1, A.R.A.P. placing a limitation on the applicability of Rule 47, A.R.A.P., then amicus curiae could not raise it or inject it into the review.

On May 28, 1993, the Supreme Court of Alabama rendered its opinion, holding that Rule 1, A.R.A.P. limited the applicability of Rule 47, A.R.A.P. That Rule 47, A.R.A.P. would only apply to settlement agreements reached at the appellate level, while Section 34-3-21, Code of Alabama(1975) would apply to settlement agreements reached at the trial court level; reversing and remanding this case to the court of civil appeals.

On June 10, 1993, petitioner filed an appli-

cation for rehearing and requesting that pertient facts be included in the opinion, pursuant to Rule 39(k), A.R.A.P. Facts petitioner requested to be added were as follows: (1) that the settlement agreement was signed under duress; (2) that the trial court relied on a copy rather than the original; (3) the trial court never held a hearing on settlement agreement; (4) respondent never filed an objection to the case going forward; (5) respondent did not file a Rule 12(g) A.R.A,P. estopple the case as an affirmative defense; and (5) respondent acquiesence and therefore was not entitled to enforce the agreement.

Petitioner also requested that the court delete that part of its opinion that held that Rule 1, A.R.A.P. placed a limitation on the applicability on Rule 47, A.R.A.P. as the respondent never raised such an issue. That to have so narrowly defined the applicability of Rule 47, A.R.A.P. conflicted with the law under Article I, § 6; Article I, § 13 of the Alabama Constitution(1901) and the Fourteenth Amendment to the

U.S. Constitution.

More specifically, petitioner invoked the protection of the Fourteenth Amendment, to wit:

> "If these rules are to have meaning, Sims was barred from motioning to enforce beyond the time frame. In other words, the Rules of Civil Procedure should have been reviewed by this court pursuant to Article I, § 6, of the Constitution of Alabama, 1901 and the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. This case then did not represent a simple issue of signing a settlement agreement. It represented the denial of procedural due process rights; and the denial of guaranteed rights under Article I, § 6 of the Alabama Constitution and the equal protection clause of the Fourteenth Amendment." (p. 3)
>
> "More importantly, this Court's narrow definition of the applicability of said rule vis-a-vis the statute conflicts with

the law under ...the Fourteenth Amendment of the Constitution." (p.14)

The court did not consider these constitutional questions. It overruled the application on July 23, 1993.

On August 6, 1993, petitioner served notice that he would appeal the court's opinion to the United States Supreme Court.

On August 27, 1993, the Alabama Court of Civil Appeals reversed and remanded this case to the trial court. It entered an opinion in accordance with the opinion of the Supreme Court of Alabama.

On September 8, 1993, the Clerk of the Supreme Court of Alabama served upon petitioner the Certificate of Judgment.

ARGUMENT

Petitioner belives that the law of this case should be shaped by the facts. The Supreme Court of Alabama incorrectly applied the Federal Middle Court's holding under Spurlock v. Pioneer Services, Inc., 808 F.Supp. (M.D.1992) to the facts of this case without deciding petitioner's federal question raised on the merit.

Under Spurlock, supra. the federal court distinquished between the enforceability of a settlement agreement reached at the trial court level and one reached at the appeals level. Concluding that the law under Section 34-3-21, Code of Alabama(1975) governed the enforcement of the former, while the law under Rule 47, A.R.A.P. governed the enforcement while the case is on appeal.

Spurlock, supra. did not address the extraordinary facts this case presented, e.g., whether respondent's failure to file an objection at the trial court level or to plea an affirmative defense estopple this case from going forward wai-

ver any right to enforcement. Waiver is the intentional relinquishment of a known right. American Locomotive Co. V. Gyro Process Co., 185 F.2d 316; Curtis Pub. Co. v. Butts, 87 S.Ct. 1975, 388 U.S. 130, 18 L.Ed.2d 1094.

Spurlock, supra did not provide a remedy at law regarding respondent's failure to serve a motion upon he as provided under Rule 5, A.R.C.P. Neither did it address the right to procedural due process of the trial court refusal to set this motion down for hearing under provisions of Rule 78, A.R.C.P.

The Due Process and Equal Protection Clause of the Fourteenth Amendment guarantee that due process rights of the petitioner will not be denied, abridged or violated in a civil case tried to the court. It requires at a minimum notice and an opportunity to present evidence and witnesses to controvert claims of the respondent. Petitioner was denied this essential guaranteed due process right. Carey v. Piphus, 435 U.S. 247 266, 98 S.CT. 1042, 1053, 55 L.Ed.2d 252 (1978).

Spurlock, supra did not address the fact that the purpose of notice under the due process clause was to apprise petitioner of and to permit he adequate time to prepare for the hearing.

Spurlock, supra did not address the fact that petitioner was totally and completely surprised at the trial (See CRT-29; 47). The fact of this case show that petitioner informed the trial court on more than one occasion that he was not prepared for trial, that he was expecting a hearing, and that he was not expecting respondent to adduce oral testimony from his former attorney (See CRT-29; CRT-47). The Due Process Clause of the Fourteenth Amendment requires a fair trial. In Re Murchison, 75 S.Ct. 623. It requires a fair tribunal. In Re Murchison, supra.

Petitioner was prejudiced by the trial court allowing three different attorneys to represent the defendant-Attorneys Charles P. Gaines, Ralph D. Gaines and Ralph D. Gaines, III (sic). The Fourteenth Amendment was ordained to secure equal rights to all persons whether they are pro se,

or represented by a cadre of well-paid attorneys. The Fourteenth Amendment insures to all persons, the enjoyment of such rights. Ex parte Com. of Va., 100 U.S. 339, 25 L.Ed. 676.; Carey v. Piphus 435 U.S. 247, 266, supra.

The trial court's order of May 8, 1991, permitted respondent to subpoena petitioner's complete personnel files- letters, memos, notes and all other documents (R-281)- without giving the petitioner an opportunity to oppose the motion. The Fourteenth Amendment, under the ambit of the First Amendment, protects the disclosure of priviledged and confidential information. McGhee v. Sipes, 68 S.CT. 836, 334 U.S. 1, 92 L.Ed. 1161. Clearly, Spurlock, supra was inapplicable to the extraordinary, unique facts of this case. A preponderance of the evidence standard should have applied. Rivera v. Minnick, 107 S.CT. 3001 (1978).

The opinion of the Supreme Court of Alabama acknowledged that there is a conflict among the courts regarding the enforcement of a settelemnt

agreement. It cited Wright v. Fountain, 454 So. 2d 520 (Ala. 1984); Anonymous v. Anonymous, 353 So.2d 515 (Ala. 1977); and Bowman v. Integrity Credit Corp., 507 So.2d 104 (Ala.Civ.App. 1987).

The Alabama Court of Civil Appeals applied a preponderance of the evidence standard, to wit: (1) it found that the settlement agreement did not satisfy the law under Bowman, supra, i.e., it was not entered on the record, it was not made in open court and it was not reduced to a court order dismissing the claim. Rudolph v. First S.Fed. Sav. & Loan, 414 So.2d 64 (Ala. 1982).

Petitioner relied on Bowman, supra to the extent there was no entry in the record of the settlement agreement; the trial court held no evidentiary hearing on it; and the trial court did not enter an order dismissing the case on May 28, 1990. Catlin v. United States, 324 U.S. 229, 233, 65 S.Ct. 631, 633-634, 89 L.Ed. 911 (1945). The Court of Civil Appeals relied on Rudolph, supra.

If Section 34-3-21, Code of Alabama(1975) required that the settlement agreement to have

been entered on the record and announced in open court, as this opinion held, then it foreclosed adjudication of due process issues. On the other hand, if Rule 47, A.R.A.P. required enforcement of a settlement agreement to have been signed while the case was at the appellant level, as this opinion held, then it too failed to address the unique and extraordinary facts of this case. Respondent never raised the issue of whether Rule 1, A.R.A.P. limited the applicability of Rule 47, A.R.A.P. Amicus curiae raised the issue. The opinion then was tantamount to amicus curiae's position. The due process of the Fourteenth Amendment prohibited such inclusion. Ex Parte Com. of Va., 100 U.S. 339, 25 L.Ed. 676. It equally protects against adding to the record once the case goes on appeal, regardless or whether the clerk submits a sworn statement attesting to its authenticity. Exxon Corp. v. Eagerton, 103 S.Ct. 2296 at n. 3.

For the Supreme Court of Alabama to have so narrowly delimited the applicability of Rule 47,

A.R.A.P. in juxaposition with Section 34-3-21, Code of Alabama(1975) went beyond the legislative intent of the statute. The purpose of the statute was not to bind petitioner to a settlement agreement that was unfair, unjust or one which did not pay he for his pain and injuries. Senn v. Joseph, 106 Ala. 454 (1894).

It is the general practice in Alabama that an appellate court will not consider issues raised for the first time on appeal. Exxon Corp., supra. at n.3.

The record as a whole shows that petitioner invoked the protection of the Due Process and Equal Protection Clause of the Fourteenth Amendment at an early stage in these proceedings. Yet, this state's highest court failed to act on these federal claims. Therefore, petitioner has exhausted remedy in the state's highest court, without having his federal constitutional claims adjudicated. Street v. New York, 394 U.S. 576, 583, 89 S.Ct. 1354, 1360 22 L.Ed. 572. Without vindication of these important constitutional rights,

petitioner will suffer irreparable harm now and in the future. Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99, 99 S.Ct. 1601, 1607, 60 L.Ed. 2d 66 (1979); Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38, 96 S.Ct. 1917,1924, 48 L.Ed. 2d 450 (1976); Wengler v. Druggists Mutual Insurance Co., 446 U.S. 142 147-149, 100 S.Ct. 1540, 1543-1544, 64 L.Ed 2d 107 (1980); Heckler v. Mathews, 104 S.Ct. 1387.

CONCLUSION

The Equal Protection Clause of the Fourteenth Amendment guaranteed to petitioner equal rights under the law. The Due Process Clause guaranteed to he procedural, statutorial and constitutional due process rights. Upon proper showing of the denial, violation and abridgement of these substantive due process rights guaranteed under the First, Seventh and Fourteenth Amendment to the U. S. Constitution, this Court, as the grantor of these rights, shall so vindicate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on 10/1/93 I served three (3) copies of this application on Attorney Charles P. Gaines, 127 North Street, Talladega, Alabama 35160 by placing the same in the U.S, Mail with prepaid postage.

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